(4)

No. 06-1308

IN THE

Supreme Court of the United States

LEGAL SERVICES FOR NEW YORK CITY,
SOUTH BROOKLYN LEGAL SERVICES, and
FARMWORKER LEGAL SERVICES OF NEW YORK,

Petitioners,

v.

LEGAL SERVICES CORPORATION and
UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

Petitioners' corporate disclosure statement was set forth at page *ii* of the Petition for a Writ of Certiorari. and there are no amendments to that statement.

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Petitioners respectfully submit this reply to briefs in opposition to certiorari filed by respondent Legal Services Corporation ("LSC"), and the Solicitor General ("SG") (collectively, the "government briefs").

1. This case challenges the government's unprecedented effort to place massive burdens on the ability of LSC-funded lawyers to use private, state and local government funds (referred to as "private funds") to offer their indigent clients the legal techniques routinely available to all other litigants. The SG's suggestion that such burdens are longstanding is simply inaccurate. Until the enactment of the restrictions at issue in 1996, Congress had not sought to impose restrictions on the use of funds from state and local governments, and had not sought to limit the lawyering techniques available to LSC-funded lawyers.

2. The government's briefs inaccurately describe the record:

First, the SG fails to mention significant aspects of the "Clarified Proposal," in which petitioners formally requested permission from LSC to channel their non-federal funds through an affiliate. SG Br. at 5. The proposal is carefully designed to avoid both subsidization of the forbidden speech, and public confusion over whether government endorses that speech. It provides for: (a) formal legal separation; (b) an identifiably separate name; (c) substantial signage and disclaimers to distinguish the respective activities of each affiliate; (d) scrupulous record-keeping and accounting; and (e) separation of the activities of each affiliate into separate rooms or separate times in a shared space.[1] These measures provide far greater protection against cross-subsidization and confusion than does the federal government's so-called Faith-Based Initiative, which does not require legal separation, disclaimers or signage.

1. The Clarified Proposal is reproduced at App. 178a.

See, e.g., 24 C.F.R. § 92.257(b), (d); 28 C.F.R. § 38.1(b), (c). Indeed, LSC concedes that the Clarified Proposal would satisfy its interests in avoiding subsidization and confusion. App. 214a-215a.

Second, while the government acknowledges that the restriction at issue burdens petitioners' ability to use non-federal funds for protected speech, it contends that petitioners and the District Court overstate the degree of separation required between petitioners' federally funded, approved activities and privately funded, disapproved activities. LSC Br. at 11-13; SG Br. at 9. But the government ignores the District Court's specific assumption that LSC would allow the programs to share some physical space, personnel and equipment when it calculated the burden on petitioners. *See* A-234a (calculation of burden imposed on South Brooklyn Legal Services is based on sharing an attorney); A-238a (calculation of burden imposed on Farmworker Legal Services is based on sharing physical space, personnel and equipment). This assumption was generous. Neither the regulations in question, nor the government briefs, nor LSC's formal rejection of petitioners' Clarified Proposal make any effort to quantify the level of separation that LSC would find acceptable. Indeed, LSC's careful use of wiggle words, such as "not necessarily," "may" and "may well," is clearly designed to preserve the option to impose whatever level of separation LSC desires. *See, e.g.*, LSC Br. at 12, 13. Far from a saving grace, the regulation's vagueness is an independent vice, chilling private speech by making it virtually impossible for LSC recipients to gauge what level of physical separation LSC will insist on.

Third, the government's claim that numerous legal services programs have established affiliates under the regulations is unfounded. LSC Br. at 9; SG Br. at 17. On the contrary, the record demonstrates that: a) several of the affiliates to which the government points do not engage in restricted speech;

b) several have simply given up seeking to operate a unified program and have re-organized as two completely unaffiliated organizations with massive losses of efficiency and coordination; and c) the ability of the rest to serve their clients is severely undermined by the extremely burdensome nature of the restrictions. In sum, the government cannot identify a single convincing example of affiliated organizations operating with less than extreme burden.

3. Several concessions in the government briefs underscore the fact that the petitioners' Clarified Proposal satisfied the government's legitimate interests. *First*, LSC admits in its rejection of the Clarified Proposal that its requirement of burdensome substantial physical and personnel separation is not necessary to further any serious government interest in preventing cross-subsidization or preventing public confusion. Indeed, LSC candidly argues that it is not obliged to provide any justification at all for the severe burdens it imposes on petitioners' speech. LSC Br. at 23-26.

Second, the SG argues that the severe speech burdens are justified to avoid the risk of public confusion. SG Br. at 15-16. But, given LSC's concession that the signage and disclaimers described in the Clarified Proposal are sufficient to avoid confusion, such a contention is insupportable. Moreover, the SG's argument is based on implausible worst-case scenarios, and this Court has repeatedly invalidated censorship designed to avoid such speculative concerns over the possibility of public confusion. Cert. Pet. at 22-23.[2]

2. The SG also half-heartedly argues that separate physical facilities are needed to assure that federally funded lawyers are not diverted from congressionally approved tasks. SG Br. at 15. Tellingly, it cites no District Court finding to this effect, nor any evidence before the District Court that would have allowed it to make such a finding, because no such evidence exists.

I.

REVIEW IS NECESSARY TO RESOLVE A BURGEONING DISPUTE OVER GOVERNMENT POWER TO IMPOSE MASSIVE AND UNJUSTIFIABLE BURDENS ON GRANT RECIPIENTS

The government pins its legal case on the erroneous assertion that the Spending Clause empowers it to impose severe, unjustifiable burdens on the privately funded speech of grantees, as long as the burdens deter, but do not "effectively preclude" that speech. SG Br. at 6, 11; LSC Br. at 22. The government's position is, however, on a collision course with this Court's cases regarding conditions on the speech rights of federal grantees, and with its related cases regarding the speech rights of government employees and contractors. Both lines of precedent require scrutiny of the adequacy of the government's justifications for imposing substantial burdens on the private speech of persons receiving federal benefits.

The government misreads the seminal "unconstitutional conditions" cases. In *Regan v. Taxation with Representation*, 461 U.S. 540 (1983), and *FCC v. League of Women Voters*, 468 U.S. 364 (1984), the Court held that funding conditions imposing *insubstantial* burdens on privately funded free speech are constitutional, precisely because the conditions do not operate to deter the speech. At the same time, the Court recognized that funding conditions imposing a *substantial deterrent* to privately funded speech must undergo classic First Amendment scrutiny. Cert. Pet. at 17-18.

The government argues that these cases support funding conditions that impose massive burdens on a grantee's ability to use private funds for First Amendment activities, as long as the burdens merely deter, but do not effectively preclude, the

privately funded speech. LSC Br. at 16-21; SG Br. at 12-13. However, the fair import of the cases, particularly when read together with the government employee speech cases discussed below, forbids the government from using funding conditions to place unjustifiably severe burdens on a grantee's use of its private resources to engage in First Amendment activity. Cert. Pet. at 17-18.

If any doubt persisted concerning the legal standard established in *Regan* and *League of Women Voters*, it was dispelled by *United States v. American Library Association*, 539 U.S. 194 (2003), upholding a funding condition that required filters on privately funded computer terminals in federally subsidized libraries. The plurality opinion noted that the funding condition required merely that a patron ask that the filter be turned off. Since this trivial burden did not deter privately funded speech, the plurality upheld the condition. Cert. Pet. at 18-20.

Justice Breyer explicitly based his concurrence on the trivial nature of the burden, and the importance of the government's interest in protecting children. 539 U.S. at 220. Justice Kennedy's concurrence likewise stressed the trivial nature of the burden, while cautioning that if turning off the filter significantly burdened privately funded free speech in a given setting, a library patron would be entitled to seek as-applied relief. *Id.* at 214.

Although Justices Breyer and Kennedy provided the crucial votes for upholding the funding restriction, the SG simply ignores Justice Breyer's concurring opinion. Even worse, the SG seeks to turn Justice Kennedy's opinion into a bait and switch maneuver, where a library patron experiencing severe burdens is invited to seek as-applied relief, only to be told that severe burden and substantial deterrence is not enough. SG Br. at 13-14.

The government's reading of *Rust v. Sullivan*, 500 U.S. 173 (1991), is equally flawed. The government argues that *Rust* upheld a funding condition requiring separate physical facilities for privately funded speech about abortion because the restriction did not "effectively prohibit[ ]" the privately funded speech. SG Br. at 10. However, *Rust*, especially as it has been interpreted by this Court in *Velazquez v. Legal Services Corporation*, 532 U.S. 903 (2001) ("*Velazquez I*"), is fully consistent with this Court's long-standing refusal to permit burdensome speech conditions in the absence of a showing of genuine government need. In *Velazquez I*, this Court held that the primary government interest underlying the *Rust* regulations – a need to shield the government's family planning message from being garbled – does not exist in the context of the legal services program, where the government is not delivering any message. *Id.* at 541-42. In the absence of such an important governmental interest, burdensome restrictions on private speech such as those imposed by *Rust* are simply unconstitutional.

The Court's government employee speech cases similarly demand that the government justify a severe burden on private speech by showing that it is tailored to serve important government interests. *See, e.g., U.S. v. National Treasury Employees Union* ("*NTEU*"), 513 U.S. 454, 475 (1995) (holding that regulations burdening government employees' private speech are constitutional only if the government can "'demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way'") (quoting *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 664 (1994)). These cases are highly relevant here, because in *Board of County Commissioners v. Umbehr*, the Court recognized that the government has more latitude to regulate the private speech of government employees, such as the *NTEU* plaintiffs, than to restrict the private speech of government independent

contractors, "who are much less dependent on the government but more like ordinary citizens whose viewpoints on matters of public concern the government has no legitimate interest in repressing." 518 U.S. 668, 680 (1996). *Umbehr* and *NTEU*, thus, reinforce the unconstitutional conditions cases discussed above, making clear that the imposition of severe burdens on the private speech of persons receiving government funds must *always* be justified by a genuine need to advance important governmental interests.

Whether one measures the constitutionality of such a severe burden on free speech under traditional strict scrutiny, as the *League of Women Voters* Court said applies in the regulation of government grantees in the non-broadcast context, 468 U.S. at 375-76, a form of heightened scrutiny, as Justice Breyer's *American Library Association* concurrence urged, 539 U.S. at 216-18, or the *NTEU* standard discussed above, the First Amendment requires that when the government seeks to impose severe burdens on privately funded free speech, the burdens must always be justified by and tailored to serve important government interests. The Spending Clause is not an exception to the First Amendment.

This Court should hear this case for three important reasons. First, the government's "effective preclusion" standard, endorsed by the Circuit panel, is a blueprint for massive, and discriminatory, government censorship. Indeed, subsequent to the filing of the petition for certiorari herein, the U.S. Agency for International Development ("USAID") and U.S. Department of Health and Human Services ("HHS") adopted guidelines importing the LSC separation regime into the international public health arena. These guidelines apply to non-profits receiving federal funds to fight HIV/AIDS overseas that want to use their non-government funds to engage in privately funded speech on a crucial public health issue: the government's

treatment of prostitution in the fight against HIV/AIDS. The guidelines are explicitly modeled on the LSC restrictions, and both agencies point to the Circuit panel's upholding the LSC restrictions in this case as the reason for adopting the LSC model. USAID, Acquisition & Assistance Policy Directive 05-04 Amend. 1 (July 23, 2007);[3] HHS, Guidance, 72 Fed. Reg. 41076-01 (July 26, 2007).

The SG's labored effort to justify the Executive Branch's favored treatment of religious speech (which faith-based federal grantees may conduct in the same physical space in which they engage in government-funded speech), is utterly unpersuasive. Indeed, if anything, the risk of an Establishment Clause violation calls for greater concern with physical separation in the religious context than in the legal services and public health contexts.

Second, the government's insistence on the power to impose funding conditions that result in unjustifiably severe burdens on privately funded free speech by government grantees threatens the viability of emerging public/private partnerships designed to deliver services far more effectively than either private parties or the federal government could achieve on their own.

Third, the huge expense needed to operate and maintain redundant legal programs in separate physical settings with separate equipment and separate personnel has effectively deterred petitioners – and legal services programs across the United States – from deploying their private and non-federal resources efficiently to provide indigent clients with desperately needed legal representation. *See* discussion *supra* at 2-3. Given the threadbare nature of the government's legal position, and the huge stakes for the administration of justice, this case clearly merits review.

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3. Available online at http://www.usaid.gov/business/business_opportunities/cib/pdf/aapd05_04_amendment1.pdf

II.

THE CASE IS RIPE FOR REVIEW

The SG (but not LSC) urges this Court to defer review pending additional proceedings in the District Court. However, requiring such a time-consuming detour after more than ten years of litigation would be both superfluous and unfair, especially in the context of a longstanding First Amendment controversy affecting the delivery of legal services to millions of poor people. *See City of Littleton, Colo. v. Z.J. Gifts D-4, LLC*, 541 U.S. 774, 782 (2004) (discussing the "constitutional need" for courts "to avoid 'undue delay result[ing] in the unconstitutional suppression of protected speech'") (quoting *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 228 (1990)).[4]

In fact, the District Court has carefully assembled a voluminous record, meticulously quantified the severe burdens the separation requirement imposes on petitioners' privately funded speech, and fully considered the government's proffered interests. *See* Cert. Pet. at 10-12. The District Court found that, with a slight modification, the terms of the Clarified Proposal fully protect the government's legitimate interests, rendering the severe burdens imposed by LSC violative of the First Amendment as applied to petitioners. *Velazquez v. Legal Servs. Corp.*, 349 F. Supp.2d 566, 607-613 (E.D.N.Y. 2004), App. 126a-144a, *modified by* 356 F. Supp.2d 267 (E.D.N.Y. 2005), *aff'd in part, vacated in part*, 462 F.3d 219 (2d Cir. 2006).

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4. The SG tries to delay resolution of this important constitutional issue by arguing that certiorari is inappropriate for interlocutory appeals. SG Br. at 7-9. But when, as is the case here, further factual development is not necessary, and the case is of "substantial importance," this Court grants certiorari to review interlocutory orders. *See Frisby v. Schultz*, 487 U.S. 474, 478-79 (1988).

In seeking further delay, the government does not and cannot point to evidence that the District Court, which relied on undisputed stipulated factual findings to which all parties agreed, failed to take into account. Nor does it point to evidence the government would present for the first time were the case to return to the District Court. Instead, the government and the Second Circuit focus their criticisms solely on the District Court's legal analysis, arguing that the District Court should be required to apply the "effectively preclude" standard to the record.

If the Circuit's "effective preclusion" test means impossibility, the District Court will have no choice on remand but to find no preclusion, because it is always theoretically possible for a local legal services program to spend its entire budget to satisfy the government's obsession with redundant, separate physical facilities and equipment. On the other hand, if "effective preclusion" means something less than impossibility, the District Court has already made the necessary factual findings quantifying the enormous burdens imposed on petitioners' private speech, and the lack of a justification for those burdens. Accordingly, there simply could not be a starker or more precisely crystallized presentation of this important First Amendment issue.

CONCLUSION

For the reasons stated herein, a writ of certiorari should issue.

Respectfully submitted.

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